No. 91-200

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

ROBERT C. RICHARDS, EDWARD KAUFMAN
AND MARTIN ROCHMAN
Petitioners

v.

THE STATE OF NEW HAMPSHIRE
Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF NEW HAMPSHIRE

RESPONDENT'S BRIEF IN OPPOSITION

THE STATE OF NEW HAMPSHIRE
JOHN P. ARNOLD
Attorney General
HAROLD T. JUDD*
Assistant Attorney General
OFFICE OF ATTORNEY GENERAL
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301
(603) 271-3658
Attorneys for Respondent
*Counsel of Record**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

CASES, Cont.

STATUTES

No. 91-200

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT C. RICHARDS, EDWARD KAUFMAN
AND MARTIN ROCHMAN
Petitioners

v.

THE STATE OF NEW HAMPSHIRE
Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM
THE SUPREME COURT OF NEW HAMPSHIRE

RESPONDENT'S BRIEF IN OPPOSITION

THE STATE OF NEW HAMPSHIRE
JOHN P. ARNOLD
Attorney General

HAROLD T. JUDD*
Assistant Attorney General

Office of Attorney General
State House Annex
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

Attorneys for Respondent
*Counsel of Record**

COUNTERSTATEMENT OF THE CASE

This Petition is rooted in an ignoble event: the bankruptcy of the largest public utility in New Hampshire — Public Service Company of New Hampshire ("PSNH"). Petitioners Richards, Kaufman and Rochman ("RKR") are three disgruntled shareholders who control less than 0.5 percent of the PSNH stock, including the shares purchased after the PSNH Reorganization Plan was filed with the U.S. Bankruptcy Court for the District of New Hampshire. Through a series of nuisance suits they have attempted to enhance the value of their shares. They are, in the parlance of Wall Street, "bottom fishers". At the New Hampshire Supreme Court RKR sought to have their judgment substituted for that of the other 99.5 percent of PSNH shareholders. The New Hampshire Supreme Court declined to do so and denied RKR standing. Now RKR would have this Court make that substitution.

The PSNH bankruptcy was due to the escalation of the cost of the Seabrook nuclear facility ("Seabrook") from a forecasted cost of $1.3 billion in 1974 to nearly $6.5 billion upon completion in 1990. In turn, the interests of ratepayers seeking the lowest possible rates and of shareholders desiring the highest allowable return clashed, first in the U.S. Bankruptcy Court and the New Hampshire Public Utility Commission ("Commission"), then in the New Hampshire Supreme Court and in the United States District Court for the District of New Hampshire.

On July 20, 1990, following seven months of proceedings, the Commission issued its Report and Order No. 19,889 in Docket No. 89-244. Cert. Petition, App. C. It is this order that the Petitioners wish to overturn. Specifically, the Petitioners claim that the Rate Agreement approved by the Commission deprived them of their property by limiting the rates of PSNH. In reality, the Rate Agreement provides the stream of revenue which made possible the reorganization of PSNH.

The determinations set forth in the Order were made pursuant to the authority granted the Commission by the New Hampshire General Court, including New Hampshire Revised Statutes Annotated, Chapter 362-C (Supp. 1990). The statute mandated the Commission to determine whether the acquisition of the bankrupt Public Service Company of New Hampshire by Northeast Utilities ("NU") would be consistent with the public good. Specifically, the Commission was to find whether the proposed Rate Agreement between the State of New Hampshire and NU would be consistent with the public good and whether the rates for electric service as negotiated in the Rate Agreement were just and reasonable.The Commission found that the Rate Agreement met the standards set by the Legislature and approved it on that basis.

The U.S. Bankruptcy Court for the District of New Hampshire confirmed the PSNH Reorganization Plan after a vote by the shareholders and creditors to accept the plan, on April 20, 1990. Pursuant to the Plan, PSNH emerged from bankruptcy on May 16, 1991. On August 21, 1991, the U.S. District Court for the District of New Hampshire affirmed the confirmation.[1]

After the PSNH Reorganization Plan was confirmed by the U.S. Bankruptcy Court and approved by the Commission, RKR appealed the Commission order to the New Hampshire

---

[1] In the memorandum opinion, the Chief Judge found no error in the findings of the Bankruptcy Court on *de novo* review of the same issues of valuation and ratemaking analysis now raised before this Court. Appendix A, Pg. 13a. The District Court noted that "In determining whether a proposed reorganization compromise is 'fair and equitable', a bankruptcy court must assess the 'probabilities of ultimate success should the claim be litigated'... Independent review of the well-crafted opinion (of 54 pages), the 1,686 pages of transcript, and the exhibits, briefs, and other relevant documents satisfies this court that the bankruptcy judge fully complied with the above mandate." Appendix A, Pg. 11a.

Supreme Court. RKR were denied standing. In dismissing RKR for want of standing, the New Hampshire Supreme Court recognized that the Official Committee of Equity Security Holders actively participated in all proceedings before the Bankruptcy Court. On January 3, 1990, the Bankruptcy Court had approved the Third Amended Disclosure Statement, pursuant to 11 U.S.C. § 1125(b), authorizing the proponents to solicit acceptance of the Plan. The specific treatment of PSNH assets that RKR finds so objectionable were detailed in that Disclosure Statement which was distributed to shareholders in January 1990.Thus, the equity holders were aware of the valuation supported by the Rate Agreement before they voted to accept the NU sponsored Reorganization Plan. With the informed vote of the equity holders, PSNH acted in accordance with the directions of its shareholders when it later, actively supported the approval of the Rate Agreement by the Commission. PSNH vigorously acted to maximize the value of its assets in the bankruptcy proceeding in order to protect the interest of its shareholders. It was only after the Equity Committee chose to support the NU sponsored Reorganization Plan that PSNH accepted the NU plan as the maximum value to be realized for the company.

PSNH was a full party to all of the proceedings before the Commission and supported the Rate Agreement that is the subject of RKR's petition here. Cert. Petition, App. E at 468a. As shareholders of PSNH, the rights of RKR are derived from PSNH and may be asserted only through that entity. *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. 1981). Consequently, as the courts below found, RKR was without standing to pursue an appeal challenging the result advocated by PSNH with the affirmative support of the equity holders.

Petitioners allege that the Rate Agreement between the State and NU and approved by the equity holders is the basis for the lost value of their investments. The Petitioners are in error. It was the bankruptcy of the public utility that directly

affected the value of their common stock. More accurately, the Reorganization Plan approved by the Bankruptcy Court was the design of the "new" PSNH as it emerged from bankruptcy. The Rate Agreement is a part of that Reorganization Plan which allowed the corporation to emerge from bankruptcy as a viable entity by providing assured rate increases over the next seven years. Both the Commission and the New Hampshire Supreme Court found this to be an appropriate balancing of the interests of both ratepayers and investors.

REASONS FOR DENYING THE WRIT

I. *Petitioners Lack Standing to Challenge the Decisions Below.*

The Petitioners seek to have this Court reverse the holdings of the New Hampshire Supreme Court and the New Hampshire Public Utilities Commission that denied RKR standing to represent all PSNH ratepayers. In filing their Petition for Writ of Certiorari, RKR again ignore that they are barred from challenging the decisions of the Commission and the highest state Court.

A. RKR are not Proper Petitioners for Certiorari.

Because Petitioners were not a party to the case below, they have no standing to bring a Petition for Writ of Certiorari to this Court. As a nonparty below, RKR should be denied standing to bring this petition when the real party to the interests claimed by RKR, PSNH, declines to petition this Court. Indeed, PSNH, on behalf of its shareholders, actively sought the decision below. Any interests held by Petitioners were represented below and RKR have not shown their interests to be separate from those of PSNH, nor their injury to be distinct from that suffered by the corporation. *Leach v. FDIC*, 860, F.2d 1266, 1268 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3186 (1989). Even if this Court were to grant the petition to review

the New Hampshire Supreme Court's denial of standing, RKR cannot petition for review of the other aspects of the judgment below which they have included here in their Petition for Writ of Certiorari. *United Auto Workers v. Scofield*, 382 U.S. 205, 209 (1965), *Cascade Natural Gas Corp. v. El Paso Gas Co.*, 386 U.S. 129 (1967).

B. The New Hampshire Supreme Court Applied the Correct Legal Standard in Denying Petitioners Standing.

Before the New Hampshire Supreme Court, RKR failed to establish personal injury from the Commission order and, instead, sought redress of alleged harm to PSNH. Conveniently, RKR ignored the fact that PSNH, as representative of the shareholders, opposed the RKR appeal to the New Hampshire Supreme Court. Both the Commission and the New Hampshire Supreme Court found that RKR did not represent the interests of PSNH. The Commission found that "since RKR's rights have already been adjudicated by the Bankruptcy Court, RKR have suffered no 'injury in fact' by the Commission's Final Order; since RKR's rights are derivative, RKR are not 'directly affected' by the Commission's proceedings." Cert. Petition, App. E. at 468a. In reviewing this decision, the New Hampshire Supreme Court applied the standards expressed in *State ex rel. Thomson v. State Board of Parole*, 115 N.H. 414, 419, 342 A.2d 634, 637 (1975) (regarding the need to protect the litigation process from improper plaintiffs by applying the law of standing), and in *New Hampshire Bankers' Ass'n v. Nelson*, 113 N.H. 127, 129, 302 A.2d 810, 811 (1973) (holding that a party must show a direct injury to establish standing to appeal an agency decision).

RKR allege a violation of the rights of PSNH as a corporation, and of themselves as individual shareholders as guaranteed by the Fifth and Fourteenth Amendments. However, as individuals they have no standing to represent the corporate body because PSNH was an active party to all stages of the

proceedings. The Court below noted that "...a party has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected." *Appeal of RKR; Appeal of CRR and Hilberg*, N.H.U, 590 A.2d 586 (1991), *citing* 59 Am.Jur. 2d *Parties* § 33 (1987).

Furthermore, RKR failed to meet the statutory requirements of RSA Chapter 541:6 which obligate the plaintiff to demonstrate that he has suffered an "injury in fact" in order to appeal. *See also, Bankers Association v. Nelson*, 113 NH at 129, 302 A.2d at 811 (1973).

Petitioners failed to establish any injury and, thus, were denied the right to challenge the Commission's order before the New Hampshire Supreme Court. The Petition for Certiorari should be denied for the same reason.

II. *No Substantial Federal Question is Presented for Review.*

A. The Commission Correctly Applied RSA 378:30 and Due to the Specificity of Its Application to the Facts, the Issue Lacks General Application and Does Not Warrant Review by This Court.

The Petitioners wish to elevate their disappointment with the PSNH bankruptcy result to a matter of national importance. Their attempt to manufacture a federal question should be rejected.

In examining whether the application of an otherwise valid state statute effects a taking, the Court does not apply a set formula; rather, the Court conducts "ad hoc factual inquiries ... with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Min. & Recl. Ass'n.*, 452 U.S. 264,295 (1981). Thus, the *ad hoc* factual analysis that the Court would apply in plenary review here

would be restricted to the unique factual circumstances confronting PSNH. Such an analysis can have no general applicability.

As set forth in the State's Counterstatement of the Case, the PSNH facts are unique to public utility regulation in New Hampshire and have no implication for utility regulation on a national basis. Because this petition turns on particular factual matters which will not have general or recurring applicability, it should be denied. *See*, e.g., *Rice v. Sioux City Cemetery*, 349 U.S. 70, 71 (1955) (the issue must be "beyond the academic or the episodic"), *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts").

B. The New Hampshire Supreme Court Correctly Decided the Question Presented.

The crux of the Petitioners' argument is that "the State took PSNH property without due process of law when it approved the Agreement without regard to whether it will enable PSNH to recover its prudent investment in its used and useful property." Cert. Petition, p. 54. RKR's position is without merit.

The PSNH Reorganization Plan set the value of PSNH assets, not the Rate Agreement. The Rate Agreement financed the company as reorganized, but the shareholders and creditors agreed to a value for PSNH assets in a consensual plan. When presented with the Rate Agreement, the Commission applied the standards set forth in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), to balance the interests of investors and ratepayers. Likewise, the Commission and the New Hampshire Supreme Court looked to *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) for guidance in valuing the assets of a public utility. In that case, the Court held that states are free within broad limits to decide which

rate-setting methodology best meets their needs in balancing the interests of the utility and the public. *Id.* at 316.

Petitioners now ask the Court to make a new rule which will use only "prudent investment" as the measure for rate orders. No doubt, RKR are willing to present a standard which is to their own liking. However, the petitioners have failed to identify how their parochial concerns have national significance and warrant the attention of this Court.

RKR would have this Court establish a standard that prudent investment is the only issue to be determined when considering the reasonableness of the rates. Since recognizing in *Hope* that a "Commission is not bound to the use of any single formula or combination of formulae in determining rates," 320 U.S. at 602, the Court has held that there is no "prudent investment rule" required by the Constitution, but that other approaches in rate-setting might be used. *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963). Indeed, the Court has specifically rejected the adoption of the "prudent investment rule" as a constitutional standard. *Duquesne Light Co. v. Barasch*, 488 U.S. at 315 (1989). In failing to address the end result of the Commission's order, the Petitioners fail to address a critical requirement under the *Hope* standard. Moreover, the burden is not upon this Court nor upon the other parties to dissect the end result, *Hope*, 320 U.S. at 602, and the Petitioners have failed to establish a basis for abandoning this well established standard.

CONCLUSION

For the reasons stated herein, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN P. ARNOLD
Attorney General

HAROLD T. JUDD*
Assistant Attorney General

Civil Bureau
25 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3658

Attorneys for Respondent
Counsel of Record*

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

In re: Public Service Company of New Hampshire

Martin Rochman;
Edward Kaufman;
Robert Richards,
Appellants

v.

Civil No. 90-272-D

Northeast Utilities Service Group;
Official Committee of Equity
Security Holders of Public
Service Company of New Hampshire,
Appellees

MEMORANDUM OPINION

In this bankruptcy appeal, certain common stock holders of Debtor Public Service Company of New Hampshire ("PSNH") challenge confirmation of the Plan of Reorganization ("Plan").

1. Background

PSNH is the largest electric utility company in New Hampshire. In 1974 it commenced the construction of a two-unit (i.e., two reactors) nuclear power plant in Seabrook, New Hampshire. The projected cost of completion was approximately $1.3 billion, with a completion date of November 1979 for Unit I.

PSNH was the lead utility with respect to the construction of Seabrook, initially holding fifty percent ownership in the project. On May 7, 1979, the New Hampshire Legislature enacted a statute which prohibited any recovery in electric rates for construction costs of a power plant until such plant was actually producing electric power. New Hampshire Revised Statutes Annotated ("RSA") 378:30-a.[1]

The effect of this legislation was to substantially increase the cost of completion of Seabrook. Funds would thereafter have to come from financial institutions at interest, rather

---

[1] RSA 378:30-a states:

Public Utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

than from the electric rate payers. Undaunted by such adversity, PSNH and the other joint owners of Seabrook decided to proceed with its construction.

Eventually, Unit I only was completed in October 1986. Other events caused the cost of Seabrook construction (including carrying costs and interest) to escalate to $6.5 billion as of January 1, 1990. PSNH, whose ownership interest in the interim had been reduced to 35.6 percent, had invested approximately $2.9 billion in the Seabrook project.

On January 28, 1988, PSNH filed a petition for reorganization pursuant to chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 1101-1146. This unusual action on the part of a utility was triggered by the previously described escalating costs of construction at Seabrook.

On November 22, 1989, Northeast Utilities Service Company ("NUSCO")[2] and the Governor and Attorney General of New Hampshire entered into an agreement ("the Rate Agreement") whereby changes would be made in the method of establishment of electric rates by the New Hampshire Public Utilities Commission ("PUC"). On December 18, 1989, a special session of the New Hampshire Legislature enacted legislation authorizing the PUC "to determine whether the

---

[2] NUSCO is a subsidiary of Northeast Utilities ("NU"), a large Connecticut-based electric utility company.

implementation of the [Rate] Agreement would be consistent with the public good." RSA 362-C:3 (Supp. 1990).[3]

On January 2, 1990, the parties interested in finalization of the bankruptcy proceedings ("the Proponents") fined the Plan together with their Third Amended Disclosure Statements. Bankr. Document No. 2998. On January 3, 1990, the bankruptcy court approved the Disclosure Statement pursuant to 11 U.S.C. § 1125 (b) and authorized the Proponents to solicit acceptance of the Plan by the various classes of creditors and equity security holders.

The court also set April 1990 as the time for the holding of confirmation hearings.

Appellants Martin Rochman, Edward Kaufman, and Robert C. Richards ("RKR") are owners of PSNH common stock. Prior to commencement of the confirmation hearings, RKR filed objections to such confirmation. The thrust of their objections was that the common stock holders of PSNH would likely recover a greater return on their investment if a litigated rate case were held before the PUC.

---

[3] RSA 362-C:3 (Supp. 1990) provides:

The commission is authorized, after hearing, in one or more proceedings to be initiated and completed during the pendency of the Public Service Company of New Hampshire bankruptcy, to determine whether the implementation of the agreement would be consistent with the public good. If the commission so finds, it shall, notwithstanding any other provision of law, establish and place into effect the levels of rates, fares, or charges and the fuel and purchased power adjustment clause to be maintained for Public Service Company of New Hampshire, or its successor, in accordance with, and during the time periods set forth in, the agreement; then the commission shall initiate such other proceedings, hold such other hearings and take such other action as may be necessary to implement the provisions of the agreement.

Six days of confirmation hearings commenced on April 4, 1990. The proponents presented a number of expert witnesses, who testified as to utility operations, accounting methods, and rate-making case procedures. Apart from testimony by Mr. Richards, the appellants chose to rely solely on cross-examination of such witnesses.

On April 20, 1990, the bankruptcy court entered its "Order Confirming Third Amended Plan of Reorganization", Bankr. Document No. 3617, accompanying same with its "General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues", Bankr. Document No. 3618. These documents were followed by the court's "Memorandum Opinion on 'RKR' Objections Re Confirmation of Plan of Reorganization". Bankr. Document No. 3742. The effect of such rulings was the rejection of the claims of RKR. This appeal followed.

2. Discussion

The Plan provides for NUSCO to acquire PSNH for $2.3 billion. The rate agreement therein calls for annual retail electricity rate increases of 5.5 percent for a period of seven years, commencing January 1, 1990.

The Plan was the result of lengthy, arms-length, and difficult bargaining among various utility companies, PSNH, and the State of New Hampshire. Ironically, only the "give-up" of substantial funds by other classes of creditors provides any funds for distribution to the common stock holders of PSNH.

Appellants' theory is that a more substantial rate increase could result from a contested rate hearing before PUC. Based

on rejection of Generally Accepted Accounting Principles ("GAAP"),[4] and unaccepted anywhere, this argument also overlooks the dangers of "municipalization".[5] As a "fall-back", RKR relies on the unlikely possibility of a state takeover of PSNH.[6]

a. The Relevant Evidence

PSNH "wrote down" approximately $1 billion of its $2.9 billion investment in Seabrook. T. I-A, 109.[7] Robert M. Busch, Chief financial expert of NUSCO, testified that this action was appropriate, that other utilities had acted similarly, and

---

[4] The Financial Accounting Standards Board ("FASB") adopted FASB Standard 71 to specify the accounting principles to be used by regulatory enterprises such as utilities. Thereunder, an Allowance for Funds Used During Construction ("AFUDC") is capitalized, together with other construction costs, including the costs of debt. PSNH originally operated pursuant to FASB 71 until it was required to "write down" its investment.

Another standard, FASB 92, requires that utilities recover their investments over a period not to exceed ten years. The theories advanced by the appellants would require such recovery to extend for a considerably longer period of time.

[5] "Municipalization" occurs when a municipality leaves its electric supplier to generate its own or to purchase power from another source. In 1984, the City of Concord and Town of Exeter joined forces and withdrew from the PSNH electrical supply system. The City of Nashua, second largest in New Hampshire, was seriously contemplating municipalization at the commencement of and early into the bankruptcy proceedings.

[6] On May 11, 1989, the New Hampshire Legislature created the "New Hampshire Energy Authority", designed, if necessary, to take over PSNH. RSA 362-B (Supp. 1990). The funding of this authority was to be met by the issuance of revenue bonds. *Id.* at § 14.

A change in the tax laws renders such revenue bonds taxable. In any event, the Legislature repealed the statute effective January 30, 1991. New Hampshire Laws of 1990, chap. 70:5 I.

[7] The designation "T." followed by a Roman numeral refers to a volume of the transcript of the confirmation hearings. The Arabic numerals indicate the pages of such transcript volume.

that his company had done so two years previously with respect to its shares of Seabrook. *Id.*, 97-101.

As of the time of such "write-down", the PSNH rate per kilowatt hour ("KW") was 8 cents. T. I-A, III. Recovery of the entire investment would have required an increase of close to 90 percent, or a rate of 15 to 16 cents per KW. *Id.*, 111-14. Such increases would have caused many customers of PSNH to leave the system. Moreover, as concerns the "Bower-Rohr" report,* the witness testified that a one-time rate increase of 31 percent, coupled with inflationary increases thereafter, would not be affordable. *Id.*, 122-23.

Bruce W. Wiggett, comptroller of PSNH, testified as to various analyses prepared by PSNH, commencing in 1984,m which demonstrated that one-time rate increases necessary to recover the cost of Seabrook would be as high as 130 percent. T. IV, 7-8. PSNH recognized, however, that given the competition, and the regulatory and political environment it worked in, such increase could not be requested. *Id.*, 9.

Another analysis, in 1989, resulted in a suggested increase of 89 percent, which PSNH believed not attainable. T. IV, 12. In August 1987, PSNH did request a 15 percent rate increase from PUC. *Id.*, 12-14. That effort was unsuccessful. *Petition of*

---

* Prepared by economic consultants located in Hanover, New Hampshire, the Bower-Rohr report is discussed at page 210 of the Disclosure Statement. Bankr. Document No. 2998. Appellants made much of its existence, but did not seek to have any of its authors testify as witnesses. The comptroller of PSNH testified that the realities, competitive and political, would have made the Bower-Rohr suggestion of a one-time 31 percent increase, a course that would not be feasible. T. IV, 118-23.

Public Service Company of New Hampshire, 130 N.H. 265, 539 A.2d 263 (1988), *appeal dismissed*, 488 U.S. 1035 (1989).[9]

It was in light of the foregoing circumstances, stated Wiggett, that PSNH realized it could not comply with recognized utility accounting standards, *supra*, note 4, and it therefore "wrote down" the value of Seabrook to $1.8 billion. T IV, 17-24. PSNH did not, however, change the Form 1 filed with regulatory agencies, as it sought to preserve value in the event of such future events as a marked rise in oil prices. *Id.*, 24-28. As of his testimony on April 11, 1990, Wiggett believed a further "write down" of $260 million might be required in the financial statement for the year ending 1989. *Id.*, 29-30.

Andrew B. Herf, a partner in the Accounting & Auditing Group of Arthur Andersen & Company, described in detail the accounting foundation for the "write down". T. IV, 146-69. His conclusion was that the final reduced value of $1.8 billion was a ceiling beyond which PSNH could not move. *Id.* at 169.

Herf also testified that the "host of factors" involved in any rate case made it "virtually impossible" to predict the outcome of such case. *Id.* at 190.

A number of witnesses testified with respect to the "auction" of PSNH. Robert M. Spann, senior consultant for Charles River Associates, lecturer in economics at George Washington University, and a specialist in regulatory economics and finance, testified that if the value of PSNH was greater than that offered by NUSCO, some other entity would have made such offer. T. III, 115-23. Spann also testified that if the argument of RKR was adopted, the result would be elec-

---

[9] The requested rate increase of 15 percent necessarily involved a challenge to the constitutionality of the "anti-CWIP" law, RSA 378:30-a, *supra*, note 1. PUC accordingly transferred the entire issue to the New Hampshire Supreme Court, which upheld the constitutionality of that statute.

tric rates which were too high to be acceptable to most current customers of PSNH. *Id.*, 72-94.

John F. Curley, managing director of the Merchant Banking Department of Morgan Stanley, was retained to advise NUSCO on the possibility of purchasing PSNH. T. III, 196-97. He testified that the Plan of NUSCO offered the highest value available at the conclusion of the well-publicized auction, which had interested four substantial regional utility companies. Id., 227-30. Intimately involved in the financing of the Plan, Curley was optimistic that such financing would be successful. *Id.* 199-215.

Wilbur J. Ross, Jr., of Rothschild, Inc., has been the financial advisor to parties in interest in many major bankruptcy reorganizations. T. III, 283-84. Retained by the equity Committee in this reorganization, he detailed the difficulties encountered in negotiating the Plan. *Id.*, 284-90. A key factor of Plan success was concessions made by preferred stockholders of $135 million of pre-petition accrued dividends and $109 million of post-petition dividends to the common stock holders. *Id.* at 285. Before the Plan was finalized, the Equity Committee seriously considered, but ultimately rejected, both a litigated rate case and a state takeover of PSNH. *Id.*, 285-90.

Peter Fox-Penner, vice president of Charles River Associates, specializes in electric economics and electric utility matters. T. I-A, 160-62. He testified as to "price paths", i.e., the sequence of prices over time, which includes consistency in price/revenue planning to achieve desired revenue results. Id., 166-67. A price in excess of such projections results in a decrease in sales and/or a loss of customers. *Id.*, 168-71. A comparison chart created by this witness showed the difference between pricing under the Plan as contrasted with the theory of RKR. NUSCO Exhibit 8, Id., 174-79. Initially, this demonstrates the prices to be charged under the Plan to exceed the prices paid by 80 percent of New England electricity cus-

tomers. *Id.* While some loss of customers is anticipated, the witness opined that the prices would not be so high as to prompt new attempts at municipalization. *Id.* With the prices suggested by RKR, there would be a much greater loss of customers to municipalization or cogeneration. *Id.*

With respect to the possibility of a "phase-in" of rates, witness Robert Spann testified that this approach might present lower initial rates, but higher rates at a later date. T. III, 168-88. While a phase-in would have both benefits and costs, such method of calculation has never provided a "free lunch". *Id.* at 188.

Appellant Robert C. Richards was an attorney for Long Island Lighting Company ("LILCO") from 1971 to 1984. T. V, 41. From 1984 to 1989 he was a member of the Strategic Planning Department and Thereafter the Financial Planning Department at LILCO. *Id.*, 41-42. His understanding of New Hampshire law is that PSNH "has a right to recover its prudent investment in its facilities and, therefore, it must be allowed to recover its investments if at all possible." *Id.* at 43. If the one-time increase of Bower-Rohr, *supra*, note 8, followed by annual increases for inflation, could not be adopted, then NUSCO Plan rates at 7 years, followed by annual inflationary increases until the plant investment was recovered, would maximize the value of PSNH. *Id.*, 49-52.

Richards felt that the Plan imposes no "real burden" on the ratepayers, although the common stock holders have lost most of their investments. *Id.*, 53.

At least one of the formulas suggested by Richards which would lead to a phase-in over the life of the asset, would be in violation of FASB 92. *Id.*, at 73. Another formula assumes that rates of 16 cents per KW would be feasible. Id. at 112, 113.

In sum, Richards felt that the anti-CWIP law, RSA 378:30-A, *supra*, note 1, drove up costs, and equates with a "bet" that Seabrook would not run. Id., 202-05. As the "bet" was won by the investors, they should have the right to recover the full value of their investments. *Id.*, 205-06.

The proposal advanced by the appellants assumes $2.5 billion of debt, and a 31 percent increase plus 4 percent annual increases thereafter. T. III, 85-87. This amount of debt would be 70 percent of the $3.6 billion assumed by the proposal, and would result in a debt ratio much higher than any publicly regulated utility, and in fact exceeded by only 4.7 percent of all publicly held companies. *Id.*, 88. The issuance of $2.5 billion of debt would cause fixed interest charges to be 50 percent higher, and if backed only by Seabrook, the interest charges would be much higher. *Id.*, 89. At such "razor-thin" margin, PSNH, with such happening as an extended outage, would be right back in the bankruptcy court. *Id.*, 90.[10]

b. Relevant Law

In determining whether a proposed reorganization compromise is "fair and equitable", a bankruptcy court must assess the "probabilities of ultimate success should the claim be litigated." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). This requires formulation of an independent judgment "of the complexity, expense and likely duration of such litigation," as well as any "other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Id.*, *See also In the Matter of Boston & Providence R.R. Co.*, 673 F.2d 11, 12 (1st Cir. 1982); *In re Continental Investment Co.*, 637 F.2d 9.

---

[10] As of August 19, 1991, Seabrook has been in operation for one full year. Some 9 outages have occurred in that period, although none of them have been of major dimension.

11)1st Cir. 1980). Independent review of the well-crafted opinion (of 54 pages), the 1,686 pages of transcript, and the exhibits, briefs, and other relevant documents satisfies this court that the bankruptcy judge fully complied with the above mandate.

Appellants misplace reliance on what they perceive to be an "etched-in-stone" rate-making analysis grounded on a rate base which includes only property "used and useful" in the generation of electricity in which the utility's investment was "prudent" at the time made. *Appeal of Conservation Law Foundation*, 127 N.H. 606, 637-38, 507 A.2d 652, 673-74 (1986). Not only may legislators give specific instructions to their utility commissions, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989), but the prudent investment rule is not a constitutional standard *Id.* at 315.

As previously indicated, in the consideration of the complex administrative and judicial proceedings attendant on Seabrook, New Hampshire's highest court has upheld the constitutionality of the "anti-CWIP" law, RSA 378:30-a, *supra*, note 1. *Petition of Public Service Co. of New Hampshire, supra.*[11] And, in events subsequent to the conclusion of the confirmation hearings herein, the New Hampshire Court has upheld the Plan here at issue. *Appeal of Richards, N.H.*, 590 A.2d 586 (1991).[12]

In short, the preponderance of the evidence presented at the confirmation hearing demonstrates that a litigated rate

---

[11] Significantly, the Supreme Court of the United States dismissed the appeal of this ruling some twelve days after it had rendered its decision in *Duquesne Light Co. v. Barasch, supra.*

[12] In *Appeal of Richards*, the PUC, pursuant to the mandate of RSA 362-C (Supp. 1990), *supra*, note 3, had approved the Plan which is at issue in these proceedings. The New Hampshire Court ruled that RKR lacked standing to challenge this finding, and also upheld the ruling of the PUC.

case, with its length, complexity, and cost, would probably not result in a rate award greater than that presented by the Plan. Moreover, the record further demonstrates that the accounting and economic changes advocated by RKR would not likely be adopted.

3. Conclusion

Careful review of the record presented satisfies the court that there was no error in thew findings of the bankruptcy judge. *De novo* review of the relevant legal authorities demonstrates that he correctly applied the law.

Accordingly, the appeal herein must be and it is herewith denied. The court finds that there is no merit in any argument or suggestion that further stay pending appeal or interference with the bankruptcy proceedings now be had, and directs the clerk to expeditiously enter judgment affirming the findings of the bankruptcy court in this reorganization.

SO ORDERED.

Shane Devine
Chief Judge
United States District Court

– August 21, 1991.

cc: Robert C. Richards, Esq.
John B. Nolan, Esq.
Richard Levin, Esq.
Geoffrey Kalmus, Esq.
Howard Berman, Esq.
George J. Wade, Esq.
Robert Drain, Esq.
J. Michael Deasy, Esq.
Harold T. Judd, Esq.
Thomas D. Rath, Esq.
George A. Vannah, Clerk - BK